UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

JAMAL Y. ELHAJ-CHEHADE, Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	Case No. 98B00068
	)	
UNIVERSITY OF TEXAS, SOUTHWESTERN MEDICAL CENTER AT DALLAS Respondent.	)	JUDGE MARVIN H. MORSE Administrative Law Judge

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION
(January 28, 1999)

I. Procedural and Factual History

Jamal Elhaj-Chehade (Complainant or Chehade) filed a Charge dated October 9, 1997, with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). Chehade alleged that the University of Texas, Southwestern Medical Center at Dallas[1] (Respondent or UTSW) and Parkland Memorial Hospital discriminated against Complainant by not rehiring him as a Clinical Research Fellow because of his national origin and citizenship status and in retaliation for asserting rights protected under 8 U.S.C. § 1324b.

By letter dated February 13, 1998, OSC informed Chehade that its investigation had not been completed within the statutory time period and that, accordingly, he may file his own complaint with the Office of the Chief Administrative Hearing Officer (OCAHO). OSC's letter to Complainant made no reference to Parkland Memorial Hospital.

On May 4, 1998, Chehade filed his OCAHO Complaint, alleging that in violation of 8 U.S.C. § 1324b UTSW knowingly and intentionally did not rehire him as a Clinical Research Fellow because of his citizenship status and national origin. The Complaint specified that UTSW discriminated against him as a lawful permanent resident (LPR) by virtue of an alleged UTSW hiring policy whereby J-1 visa holders are favored over LPRs and United States citizens. At Paragraph 10 of the OCAHO Complaint which obliges complainants to list those individuals or

[1] Identification of Respondent in the case caption was corrected from "University of Texas, Southwestern Medical School" to "University of Texas, Southwestern Medical Center at Dallas" during the first telephonic prehearing conference as confirmed by the First Prehearing Conference Report and Order (August 6, 1998).

entities against whom a complaint is filed, Chehade listed only UTSW, omitting Parkland Memorial Hospital. Chehade attached to his Complaint a three-page handwritten statement outlining his personal beliefs and selected encounters with UTSW personnel.

Respondent filed its Answer to the Complaint on June 10, 1998. "Respondent contends that Complainant was never an employee, but instead has engaged in a research study as a research fellow - training designation." Denying that it discriminated against Complainant, Respondent stated that his "research fellow position ended on October 2, 1997, when the study exhausted its funds" and that "Respondent was no longer looking for clinical research fellows for this study, regardless of their qualifications."[2]

At the first telephonic prehearing conference on August 5, 1998, Complainant specified three discriminatory actions for which he seeks relief:

(1) He endured intimidation, threat, coercion, or retaliation in September 1997, after informing UTSW personnel that he would file a charge of discrimination;

(2) He was discharged as a research fellow on October 2, 1997, because of his citizenship status as a LPR of the United States; and

(3) He made subsequent updates in the appropriate personnel office to his continuous application for research positions but was not rehired because of UTSW's pattern and practice to fill such positions with individuals holding J-1 visas in preference to LPRs and U.S. citizens with similar qualifications.

First Prehearing Conference Report and Order (August 6, 1998).

At the second telephonic prehearing conference on September 24, 1998, Respondent advised that it had taken Complainant's deposition, that it would be filing dispositive motions relying on *Hensel v. Office of the Chief Administrative Hearing Officer*, 38 F.3d 505 (10th Cir. 1994), and that Complainant had filed a national origin lawsuit in the United States District Court for the Northern District of Texas.

Respondent filed its Motion for Summary Decision on October 19, 1998, contending that this tribunal is without jurisdiction to entertain Complainant's action because: "A. The Eleventh

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[2] By Order issued June 16, 1998, I rejected Complainant's attempt to file a document captioned "Complainant's Comments" in response to Respondent's Answer because it lacked a certificate or other indication of service upon Respondent in breach of the prohibition against ex parte communications. 28 C.F.R. §§ 68.6 and 68.36.

Amendment to the United States Constitution Bars Unconsented Suits Against UT Southwestern Before Federal Tribunals[;]" "B. Congress Did Not Waive the Eleventh Amendment Immunity of the States in the Provisions of 8 U.S.C. § 1324b of the Immigration Reform and Control Act[;]" and "C. The State of Texas Has Not Waived Its Eleventh Amendment Immunity by the Enactment of the Texas Commission on Human Rights Act."

In response, Complainant filed a "Motion to leave to answer out of time" on November 9, 1998, which I granted on November 16, 1998. He filed "Plaintiff's response to the respondent's motion for summary decision" (Complainant's Response) on November 17, 1998. Complainant offered a two part, nine-page, handwritten document in support of the assertion that "this tribunal and other federal tribunals do have the jurisdiction to entertain this Complaint."

Complainant's Response contends for the first time that the "initial complaint was filed and still considered as against UTSWMS et all. [sic.] / parkland hospital," that "none of the entities listed as defendant qualifies for the Eleven [sic] Amendment immunity[,]" and that jurisdiction over the action exists under the Fourteenth Amendment, "Federal Statutes question," the First Amendment, the "Equal Protection Act of 1964," the Thirteenth Amendment, the Supremacy Clause, and the "Equal Education Act."

Complainant's Response argues that

> this case is not against a state, nor against an arm/alter ego of the state-it is against some institutions and individuals who acted outside of their authorities . . . . Furthermore, it is not [the] Texas Code of [E]ducation . . . that determine[s] which is an arm of state (alter ego) or not - This matter and issue are of federal law. . . .

Complainant referenced cases in support of his contention that Eleventh Amendment immunity does not apply to this action, while distinguishing *Hensel*. Complainant concluded by extending an offer of settlement to Respondent.

The third telephonic prehearing conference was held on December 3, 1998. On December 7, 1998, Complainant filed his "Request to submit the following information as a part of a prehearing clarification December 03-1998" (Complainant's Request). Complainant's Request seeks to clarify discussions during the conference about the J-1 visa program, to highlight his claim that UTSW has an "open" and "deliberate" discrimination policy, to restate Complainant's references to Parkland Hospital, and to address issues raised during Complainant's deposition (which were not otherwise submitted to the bench).

The Third Prehearing Conference Report and Order issued on December 9, 1998, subsequent to receipt of Complainant's Request, and summarized the December 3, 1998, conference to the effect that:

(1) I understood "Complainant to have declared that he does not claim he was employed by Parkland [Hospital] and to have conceded that his cause of action for failure to be rehired as a Clinical Research Fellow is limited to UTSW which employed him[;]" and

(2) Complainant explicitly acknowledged that his rejected applications for internship positions submitted to Parkland Hospital in July of 1997 and 1998 are not at issue in this proceeding.

On December 14, 1998, Complainant filed his "Request permission to submit to amend the complaint to include parkland and other parties involved as defendants" (Request to Amend). This Request to Amend attempted to add additional party respondents and additional discrimination claims. Complainant argued that this action as originally filed in the OSC Charge included all of the entities, individuals and claims that he currently seeks to add by this Request to Amend. Complainant contended that OSC failed to properly investigate the original Charge which included all of the referenced entities and individuals as respondents and the rejection of internship applications as discrimination claims.

On December 14, 1998, an Order issued in which I denied Complainant's Request to Amend, stating,

> The broad ranging comments contained in Complainant's [Request to Amend] provide no justification for amending the Complaint to make Parkland and/or any other entities respondents in this case. . . . Nothing in the prehearing filings or colloquy at the three prehearing conferences warrants the inference that Complainant's application to be rehired by UTSW as a Clinical Research Fellow implicates his separate applications to Parkland for internship positions or that "Parkland, et al.," are necessary parties to the dispute before me concerning the Clinical Research Fellowship.

The Order also addressed Complainant's concerns that UTSW is attempting "to evade justice" by identifying itself in its correspondence to Complainant as the "University of Texas Southwestern Medical School at Dallas." As stated, "Regardless of the name referenced, there is no doubt as to the identity of Respondent; either UTSW is amenable to 8 U.S.C. § 1324b administrative law judge (ALJ) jurisdiction or it is not."

II. Discussion and Findings

I do not reach the merits underlying this case as I lack subject matter jurisdiction over Complainant's claims. UTSW, as an arm of the state, is shielded from federal court jurisdiction by sovereign immunity under the Eleventh Amendment to the United States Constitution.

Therefore, as more fully discussed below, Respondent's Motion for Summary Decision is granted, and the Complaint is dismissed.

A. Eleventh Amendment Sovereign Immunity

Generally, the Eleventh Amendment to the United States Constitution divests federal courts of jurisdiction in suits against states. *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304 (1990); *Green v. State Bar of Tex.*, 27 F.3d 1083, 1087 (5th Cir. 1994); *Hockaday v. Texas Dep't of Criminal Justice, Pardons and Paroles Division*, 914 F. Supp. 1439, 1444 (S.D. Tex. 1996).

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. While the Eleventh Amendment only refers to suits against a state by citizens of another state, the Supreme Court has extended this prohibition to suits by *all persons* against a state in federal court. *Port Auth. Trans-Hudson Corp.*, 495 U.S. at 304; *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 100 (1984); *Employees v. Missouri Dep't of Public Health and Welfare*, 411 U.S. 279, 280 (1973).

There are two judicially recognized exceptions to this jurisdictional bar. First, Congress may abrogate state sovereign immunity by "unequivocally express[ing] its intent to abrogate the immunity" in the language of the enacting statute, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55 (1996) (quoting *Green v. Mansour*, 474 U.S. 64, 68 (1985)), and by acting "pursuant to a valid exercise of power." *Id.*. Second, states may consent to suit in federal court. *Port Auth. Trans-Hudson Corp.*, 495 U.S. at 304; *Atascadero State Hospital v. Scanlon* 473 U.S. 234, 241 (1985); *Clark v. Barnard*, 108 U.S. 436, 447 (1883).

Chehade's Complaint arises under the appellate jurisdiction of the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit's treatment of the Eleventh Amendment jurisdictional bar mirrors Supreme Court precedent.

> Absent waiver, neither a state nor agencies acting under its control are subject to suit in federal court. . . . "In deciding whether a state has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'"

Sherwinski v. Peterson, 98 F.3d 849, 851-52 (5th Cir. 1996) (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909) *cited in Edelman v. Jordan*, 415 U.S. 651, 673 (1974)) (footnotes omitted). *See also James v. Texas Dep't of Human Servs.*, 818 F. Supp. 987, 989 (N.D. Tex. 1993) (barring claim in federal court brought under Texas Human Rights Act which generally

waived state immunity but did not explicitly waive Eleventh Amendment protection of state immunity from suit in federal court. To waive immunity from federal suit, a state "must specify [its] intention to subject itself to suit in federal court.").

1. Congress Did Not Expressly Abrogate State Sovereign Immunity under 8 U.S.C. § 1324b

Chehade's claims before the ALJ arise exclusively under 8 U.S.C. § 1324b. Title 8 U.S.C. § 1324b is silent on the subject of sovereign immunity. For that reason, the United States Court of Appeals for the Tenth Circuit in *Hensel v. Office of the Chief Administrative Hearing Officer*, 38 F.3d 505, 507 (10th Cir. 1994),[3] held unambiguously that §1324b does not reach state entities.

> [T]here is no textual support by definition or even reference [in the language of the Immigration Reform and Control Act (IRCA), enacting 8 U.S.C. § 1324b,] that a "person" or "entity" includes the state. Absent explicit language in the IRCA itself, we do not find that these terms were intended to subject the state to suit in federal court. . . . Absent textual support, we cannot conclude that Congress intended to abrogate Eleventh Amendment immunity in the IRCA.

Hensel, 38 F.3d at 508 (barring federal jurisdiction over 8 U.S.C. § 1324b claims against the University of Oklahoma Health Sciences Center due to Eleventh Amendment immunity).

> Since 1324b does not manifest an intention to make the state amenable to such a suit and [when] the state has not consented to such a suit, a state may invoke Eleventh Amendment sovereign immunity with respect to a law suit brought pursuant to 8 U.S.C. § 1324b. Furthermore, state agencies and entities may be understood to act as the state's alter-ego, in which case the entity may invoke state sovereign immunity.

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[3] Finding no waiver of state sovereign immunity, the Court in *Hensel* stated,

> that under Oklahoma Law, the Board of Regents of the University is an arm of the state and that a suit against the University is a suit against the Board of Regents. . . . Therefore, [the University of Oklahoma Health Sciences Center], as part of the University, is an arm of the state for Eleventh Amendment purposes. Oklahoma has not waived its immunity. . . . Consequently, [The University of Oklahoma] is immune unless Congress has specifically eliminated Oklahoma's privilege.

Hensel, 38 F.3d at 508.

D'Amico v. Erie Community College, 7 OCAHO 948, at 436 (1997), *available in* 1997 WL 562107, at *4 (O.C.A.H.O.) (distinguishing suit against the state from suit against a local entity) (citing *Smiley v. City of Philadelphia Dep't of Licences and Inspections*, 7 OCAHO 925, at 23 (1997), *available in* 1997 WL 1048384, at *8 (O.C.A.H.O.)).

2. Texas Did Not Consent To Suit in Federal Court

The State of Texas and UTSW have not consented to federal court jurisdiction in this 8 U.S.C. § 1324b action nor waived their right to seek protection under the Eleventh Amendment.

> A waiver of the state's constitutional immunity must be clear and is not to be lightly inferred. *Edelman v. Jordan*, 415 U.S. at 678 . . . . Waiver may only be found where the waiver is express or the inference of waiver overwhelming. *Id.* Further, waiver for purposes of suit in state courts does not necessarily waive immunity for actions in federal courts. *Murray v. Wilson Distilling Co.*, 213 U.S. 151 . . . (1909).

United Carolina Bank v. Board of Regents of Stephen F. Austin State Univ., 665 F.2d 553, 559 (5th Cir. 1982).

"The Eleventh Amendment was fashioned to protect against federal judgments requiring payment of money that would interfere with the state's fiscal autonomy and thus its political sovereignty." *United Carolina Bank*, 665 F.2d at 560. UTSW claims that it qualifies for Eleventh Amendment immunity from federal court jurisdiction afforded to the State of Texas because: (1) 8 U.S.C. § 1324b does not abrogate the State's immunity; and (2) UTSW is the alter-ego of the State of Texas. Because *Hensel* and *D'Amico* establish that the language of 8 U.S.C. § 1324b does not abrogate state sovereign immunity, UTSW's ability to invoke immunity depends on whether it is an arm of the state under Texas law.

B. State Law Determines Which Entities Qualify for State Sovereign Immunity

Complainant's assertion that "it is not [the] Texas Code of [E]ducation . . . that determine[s] which [sic] is an arm of the state (alter ego) or not - This matter and issue are of federal law. . . ." is only partly correct. The suggestion that state law does not inform as to Respondent's amenability to § 1324b claims overlooks the critical role of state law in determining the character of public entities for purposes of jurisdictional analysis.

> [T]he question whether a particular state agency has the same kind of independent status as a county or is instead an arm of the State, and therefore "one of the United States" within the meaning of the Eleventh Amendment, is a question of federal law. But that federal question can be answered only after considering the provisions of state law that define the agency's character.

Regents of the Univ. of Cal. v. Doe, 117 S. Ct. 900, 904 n.5 (1997).

"In determining whether an action is really against the state, federal courts examine the power, characteristics, and relationships created by state law which concern the entity undergoing Eleventh Amendment analysis. . . ." *Hart v. University of Texas at Houston*, 474 F. Supp. 465, 466-67 (S.D. Tex. 1979) (citations omitted). "Whether an entity is an arm of the state partaking of the state's eleventh amendment immunity turns on its function and characteristics as determined by state law. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 280 (1977)." *Sessions v. Rusk State Hospital*, 648 F.2d 1066, 1069 (5th Cir. 1981) (barring former employees civil rights action against state hospital because Eleventh Amendment Immunity) (citations omitted).

> Public universities may qualify for immunity or not depending on their status under state law and their relationship to state government. In *United Carolina Bank v. Board of Regents*, 665 F.2d 553 (5th Cir. 1982), we formulated a detailed analysis for resolving the status of public universities. That analysis focused on the status of the university under state law, the degree of state control over the university, and whether a money judgment against the university would, because of the status of the university's funds, interfere with the fiscal autonomy of the state. *Id.* at 557-61.

Lewis v. Midwestern State Univ., 837 F.2d 197, 198 (5th Cir. 1988). Because state law sets forth which entities are considered alter-egos of the state, the treatment of UTSW by Texas law must be examined.

C. UTSW Is An Arm of the State

"The University of Texas Southwestern Medical Center at Dallas is a component of the University of Texas System." Tex. Educ. Code Ann. § 65.02(a)(7) (West 1998). Therefore, a determination that the University of Texas is an arm of the state confers such status on UTSW.

> The majority of decisions concerning the eleventh amendment status of state universities have concluded the institutions involved were arms of the state. Yet, each situation must be addressed individually because the states have adopted different schemes, both intra and interstate, in constituting their institutions of higher learning.

United Carolina Bank, 665 F.2d at 557 (citations omitted).

United Carolina Bank[4] sets forth the following factors which are instructive in determining whether the University of Texas is an arm of the state for Eleventh Amendment immunity purposes:

(1) Status of the University of Texas under Texas law

The University of Texas was created by the Texas Constitution:

> The Legislature shall as soon as practicable establish, organize and provide for the maintenance, support and direction of a University of the first class, to be located by a vote of the people of this State, and styled, "The University of Texas", for the promotion of literature, and the arts and sciences, including an Agricultural, and Mechanical department.

Tex. Const. art. VII, § 10. Texas law provides that a "'state agency' means a university system or an institution of higher education as defined in section 61.003 Texas Education Code, other than a public junior college." *United Carolina Bank*, 665 F.2d at 557 (citing "Tex. Rev. Civ. Stat. Ann. art. 6252-9b(8)(B) (Vernon)").

(2) Degree of Control the State Has over the University of Texas

In addition to being created by Texas law, the University of Texas is supervised and managed by the Board of Regents who are appointed by the Governor with the advice and consent of the state senate. Tex. Educ. Code Ann. § 65.11 (West 1998). Specifically related to UTSW, "[t]he board of regents may prescribe courses leading to customary degrees and may make rules and regulations for the operation, control, and management of the medical school as may be necessary for its conduct as a medical school of the first class." Tex. Educ. Code Ann. § 74.102 (West 1998) ("Chapter 74, Subchapter C. The University of Texas Southwestern Medical Center at Dallas"). Therefore, the state, through its appointments to the board of regents, maintains significant control over the University of Texas and its component UTSW.

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[4] *See also Delahoussaye v. City of New Iberia*, 937 F.2d 144, 147 (5th Cir. 1991) (examining factors akin to those used in *United Carolina Bank* to determine whether an entity is considered an arm of the state: (1) whether the state statutes and case law characterize the agency as an arm of the state; (2) the source of funds for the entity; (3) the degree of local autonomy the entity enjoys; (4) whether the entity is concerned primarily with local, as opposed to statewide problems; (5) whether the entity has authority to sue and be sued in its own name; and (6) whether the entity has the right to hold and use property.) (citations omitted).

(3) The Fiscal Autonomy of the University of Texas[5]

The University of Texas, through its Board of Regents, has limited fiscal autonomy. The Texas Legislature set apart land, other property, grants, donations, and appropriations made by the State of Texas "heretofore made or hereafter to be made" into a "Permanent University Fund" for the establishment and maintenance of the University of Texas. Tex. Const. art. VII, § 11. "All interest, dividends, and other income accruing and earned from the investments of the permanent university fund shall be deposited in the State Treasury . . . at least once a month by the board of regents of the University of Texas System ." Tex. Educ. Code Ann. § 66.02 (West 1998). "The University of Texas System shall provide the information necessary for the comptroller to accurately account for income from the permanent university fund and to protect state revenues." Tex. Educ. Code Ann. § 66.02 (West 1998). "The composition, investment, purposes, and use of the permanent university fund are governed by Article VII, Sections 10, 11, 11a, 15, and 18, of the Texas Constitution." Tex. Educ. Code Ann. §66.01 (West 1998). The board of regents of the University of Texas System prepares a financial report containing a statement of assets and a summary of gains, losses, and income from investments and securities to be distributed to the governor, state comptroller of public accounts, state auditor, attorney general, commissioner of higher education, and to the members of the legislature by the 1st day of January each year. Tex. Educ. Code Ann. § 66.05 (West 1998).

(4) Ability of the University of Texas To Hold Property

Property owned by the University of Texas is state public property. State law is the source of UT's authority to purchase, sell or lease real and personal property:

> Property conveyed to the board of regents by fiduciaries for the use and benefit of the University of Texas is the property of the university, *a department of the state*, and is public property used for public purposes and is therefore exempt from all taxation under the Constitution and laws or the state.

Op. Att'y Gen. No. 0-1577 (1939) (emphasis added)

> The board of regents of the University of Texas System has the sole and exclusive management and control of the lands set aside and appropriated to, or acquired by, the permanent university fund. The board may sell, lease, and otherwise manage, control, and use the lands in any manner and

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[5] "[B]ecause an important goal of the Eleventh Amendment is the protection of state treasuries, the most significant factor in assessing an entity's status is whether a judgment against it will be paid with state funds." *McDonald v. Board of Miss. Levee Comm'rs*, 832 F.2d 901, 907 (5th Cir. 1987), *cited in Delahoussaye v. City of New Iberia*, 937 F.2d 144, 147-48 (5th Cir. 1991).

> at prices and under terms and conditions the board deems best for the interest of the permanent university fund, not in conflict with the constitution.

Tex. Educ. Code Ann. § 66.41 (West 1998).

(5) Court Treatment of the University of Texas as an Arm of the State

"Texas courts have held repeatedly that suits against Universities . . . are suits against the state for sovereign immunity purposes." *United Carolina Bank*, 665 F.2d at 558. *See Texas v. Walker*, 142 F.3d 813, 829 n.10 (5th Cir. 1998), *cert. denied*, 67 U.S.L.W. 3156, 3189 (U.S. Jan. 19, 1999) (Nos. 98-348, 98-350) (citations omitted) ("The parties in this case do not dispute that [the University of Texas Health Science Center at Houston] and the Regents of the University of Texas, sued in their official capacity, may invoke the State's Eleventh Amendment immunity; they are 'arms' of the state for purposes of the Eleventh Amendment."); *Wallace v. Texas Tech. Univ.*, 80 F.3d 1042, 1047 (5th Cir. 1996) ("Texas Tech, as a state institution, clearly enjoys Eleventh Amendment immunity."); *Hart v. University of Texas at Houston*, 474 F. Supp. 465, 466-67 (S.D. Tex. 1979) ("[The University of Texas at Houston's] M.D. Anderson Hospital [and Tumor Institute] is an instrumentality of the State of Texas for Eleventh Amendment . . . purposes."); *Guaranty Petroleum Corp. v. Armstrong*, 609 S.W.2d 529, 531 (Tex. 1980) (holding the University of Texas System and its components agencies of the state, shielded from suit in federal court by sovereign immunity, because: (i) the University of Texas "exercises its jurisdiction throughout the State" by maintaining component institutions and entities throughout the State. *See* Tex. Educ. Code Ann. §§ 65.02, 74.101 (West 1998); (ii) the University of Texas is governed by the board of regents who "are appointed by State officials[,]" the Governor with the advice and consent of the senate. Tex. Educ. Code Ann. § 65.11 (West 1997); and (iii) the University of Texas is not authorized to assess or collect taxes. *See* Tex. Educ. Code Ann. §§ 65.11, 65.31 - 65.46, 74.102 (West 1998)); *Whitehead v. University of Texas Health Science Center at San Antonio*, 854 S.W.2d 175, 180 (Tex. App. 1993) (categorizing the University of Texas Health Science Center at San Antonio a part of the University of Texas System and, thus, finding it protected by sovereign immunity). *See also Lowe v. Texas Tech Univ.*, 540 S.W.2d 297, 298 (Tex. 1976) ("A state agency, as an arm of the state, is shielded by the sovereign immunity available to the state government.").

The State of Texas intends the University of Texas to be an arm of the state. This intent is demonstrated by the above-referenced state laws which establish that the University is under the control of officials selected by the Governor and senate, the University lacks fiscal autonomy, and the University possesses state property used for public purposes. In addition, the conclusion that the University of Texas is an arm of the state is supported by the above-cited judicial decisions to that effect. As an arm of the state, the University of Texas, including its component UTSW, necessarily qualifies for state sovereign immunity and successfully invokes the sovereign immunity defense of the Eleventh Amendment. Accordingly, I am divested of jurisdiction over

Complainant's national origin and citizenship status discrimination claims. Respondent's Motion for Summary Decision in which UTSW claims sovereign immunity from federal court jurisdiction under the Eleventh Amendment is granted.

III. *Grand Prairie* State Sovereign Immunity Issue

Respondent's Answer asks the court to revisit "the issue of whether the State of Texas had waived it [sic] Eleventh Amendment immunity from suit in federal court by waiving its sovereign immunity to allow civil actions to be filed under the Texas Commission on Human Rights Act, Tex. Labor Code Ann. §§ 21.001, *et seq.* (Vernon 1996 and Supp. 1998)" addressed in *Iwuchukwu v. City of Grand Prairie*, 6 OCAHO 915, at 1109-10 (1997), *available in* 1997 WL 176857, at *8-9 (O.C.A.H.O.). However, the *Grand Prairie* "Order Finding Jurisdiction" (Order) determined that the City of Grand Prairie, Texas, did not qualify for Eleventh Amendment immunity from federal court jurisdiction ***because it is a municipality, not an arm of the state***. Therefore, the City was subject to federal jurisdiction under 8 U.S.C. § 1324b. *City of Grand Prairie*, 6 OCAHO 915, at 1102, 1107-08, *available in* 1997 WL 17857, at *3-4, *7.

Grand Prairie did mention the necessity to determine "whether, on finding that Grand Prairie is an arm of the state under state law, the state has waived its immunity to suit in federal court." *City of Grand Prairie*, 6 OCAHO 915, at 1101, *available in* 1997 WL 176857, at *3. The issue as to whether Texas waived its state immunity to suit in federal court was not resolved, however, because it was determined that the City of Grand Prairie was a home-rule municipality, not an arm of the state. Rather, the Eleventh Amendment immunity analysis focused on the applicability to the municipality of the sovereign immunity defense.

Grand Prairie did *not* conclude that the State of Texas waived immunity for state entities from federal court jurisdiction by enactment of the Texas Commission on Human Rights Act or its successor, the Texas Labor Code. "A 'municipality . . . regardless of the number of individuals employed' is among the specific governmental employers Texas renders statutorily amenable to suit for employment discrimination. Tex. Lab. Code Ann. § 21.002(8)(D)." *City of Grand Prairie*, 6 OCAHO 915, at 1102, *available in* 1997 WL 176857, at *3. Additionally, the statement in the Order that "Texas consents to suit when federal laws governing employment discrimination are invoked" relates solely to "Texas Statutory Authority" and the State's consent to suit in its own State courts. State sovereign immunity from federal court jurisdiction is *not* abrogated when state law contains a waiver of sovereign immunity in its own state courts and/or encompasses federal employment discrimination laws within its own state statutes. *See Sherwinski v. Peterson*, 98 F.3d 849, 851-52 (5th Cir. 1996) ("A state does not waive Eleventh Amendment immunity in federal courts merely by waiving sovereign immunity in its own courts. . . .") (footnotes omitted); *James v. Texas Dep't of Human Servs.*, 818 F. Supp. 987, 989 (N.D. Tex. 1993) ("A state does not . . . necessarily waive its Eleventh Amendment immunity to suit in federal court by consenting generally to suit in its own courts. *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 306 . . . (1990)"). In short, the reach of *Grand Prairie* is to municipalities only, and not to arms of the state.

IV. Ultimate Findings, Conclusion and Order

I find that UTSW, a component of the University of Texas System, is an arm of the State of Texas. UTSW, therefore, is immune from 8 U.S.C. § 1324b jurisdiction by virtue of the Eleventh Amendment. Accordingly, I lack subject matter jurisdiction over Complainant's 8 U.S.C. § 1324b claims. This result concurs with OCAHO precedent examining the Eleventh Amendment's bar to § 1324b jurisdiction. *See D'Amico v. Erie Community College*, 7 OCAHO 948, at 439 (1997) *available in* 1997 WL 562107, at *4 (O.C.A.H.O.) (finding Eleventh Amendment immunity not available to local entity); *Smiley v. City of Philadelphia Dep't of Licenses and Inspections*, 7 OCAHO 925, at 23-30 (1997), *available in* 1997 WL 1048384, at *5-10 (O.C.A.H.O.) (finding Eleventh Amendment immunity defense not available to Philadelphia); *Iwuchukwu v. City of Grand Prairie*, 6 OCAHO 915, at 1111-12 (1997), *available in* 1997 WL 176857, at *10 (O.C.A.H.O.) ("City of Grand Prairie not entitled to defense of sovereign immunity."); *United States v. New Mexico State Fair*, 6 OCAHO 898, at 876-77 (1996) *available in* 1996 WL 776504, at *1-2 (O.C.A.H.O.) (relying on the Tenth Circuit ruling in *Hensel*, action dismissed on Eleventh Amendment grounds for lack of subject matter jurisdiction); *Kupferberg v. University of Oklahoma Health Sciences Center*, 4 OCAHO 709, at 1059-61 (1994), *available in* 1994 WL 761187, at * 2-3 (O.C.A.H.O.) (dismissing, finding the University of Oklahoma Health Sciences Center immune from liability under IRCA because of Eleventh Amendment sovereign immunity). Because the Complaint is dismissed, I do not reach either the merits or other claims by either party.

I have considered the filings by both parties. All motions and requests not specifically ruled upon are denied. In summary, I make the following determinations, findings of fact, and conclusions of law:

1. UTSW is an arm of the State of Texas;

2. UTSW can invoke the defense of sovereign immunity under the Eleventh Amendment to the United States Constitution;

3. Congress did not explicitly express its intent to abrogate state sovereign immunity under the Eleventh Amendment in Title 8 U.S.C. § 1324b;

4. Respondent's Motion for Summary Decision is granted; and

5. Because I lack subject matter jurisdiction over Complainant's 8 U.S.C. § 1324b claims, this case is dismissed.

Pursuant to 8 U.S.C. § 1324b(g)(1), this Order Granting Respondent's Motion for Summary Decision is the final administrative adjudication in this proceeding and "shall be final unless appealed" within 60 days to the United States Court of Appeals for the Fifth Circuit in accordance with 8 U.S.C. § 1324b(i).

SO ORDERED

Dated and entered this 28th day of January, 1999.

Marvin H. Morse
Administrative Law Judge